31/25

FILED
SEP 29 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 360

CAPITAL TRANSIT COMPANY, INC., *Petitioner*,

v.

JOSEPH B. SIMPSON, JR. and JANIE GAMMON LEE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 29, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW

The opinion of the court of appeals (R. 313-314) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered June 7, 1956 (R. 315). Petition for rehearing (R. 316-331) was denied July 11, 1956 (R. 352). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, in actions for wrongful death of husband and wife, the court of appeals was correct in holding that Maryland law required that the jury—not the trial court—decide whether the contributory negligence of the wife-driver be imputed to her husband.

2. Whether the court of appeals correctly applied *Louisville & Nashville R. Co.* v. *Parker*, 242 U. S. 13 (1916) in holding that petitioner—defendant below—had, by its conduct, waived jury submission of the issue of imputed negligence.

While a rehash of facts already stated more or less correctly in a petition for certiorari is as a rule unjustified, the petition in this case is so far a departure from the record herein that a counter-statement is both justified and necessary. Petitioner's "Statement" herein cannot ignore that petitioner is not now questioning—as it did below—the sufficiency of the evidence respecting primary negligence which supports this verdict and judgment in respondents' favor. Accordingly, a counter-statement is presented which briefly states the facts as they must now be presented—in favor of respondents.

COUNTER-STATEMENT

James and Patricia Stricklin, parents of the three infant children on whose behalf the instant suits were brought, were killed when their "Henry J" automobile collided with the rear of petitioner's bus. It was shortly after midnight, and the bus had stopped at an intersection in Bethesda, Maryland to discharge pas-

sengers. None of the bus' three rear lights, which Maryland requires, Md. Motor Vehicle Laws, §§ 237 (a), 238(b), nor any other rear lights, were functioning at the time (R. 46-49, 56-59, 91-93, 262-263). The two street lights on each side of the intersection were then inoperative (R. 17, 76, 85), and the rear of the bus was completely unilluminated by the nearest functioning street light (R. 101, 102). Wider than the bus, and adjoining the road, was a shoulder for "the use of vehicles" (R. 17-18, 20, 30, 241). This shoulder—which petitioner's regulations enjoined its drivers to use so as not "to interfere with other traffic" when discharging passengers (R. 116)—was in good condition, allowing its use with perfect safety (R. 18-19, Plaintiffs' Exhibits 2, 4, 6). The bus, its rear unlighted,[1] rather than pulling over to the shoulder, stopped with all four wheels at the unlighted intersection (R. 15, 17-18, 28, 219). The Stricklin car, with the wife driving, passed over a rise in the road about 380-400 feet from the intersection (R. 73-75, Plaintiffs' Exhibit 6) and collided with the rear of the unlit standing bus.

Throughout the entire two-week trial, petitioner argued that Mr. Stricklin was, as a matter of law, vicariously negligent merely because he was the sole titled owner of and a passenger in the automobile, and that contributory negligence on the part of his wife must be imputed to him as a matter of law, thereby foreclosing any recovery (R. 8, 9-10, Tr. 774-782, 827-828). At all times during trial, petitioner assiduously resisted jury submission of the issue of imputa-

[1] Although the interior lights of the bus were on, they appeared to approaching traffic as an isolated patch of light suspended over the roadway without outlining the figure of the bus (R. 108-109).

tion. The trial court ruled that under the circumstances, the wife's contributory negligence, if any, could not be imputed to the husband. After verdict, a motion for new trial was not sought, nor was error assigned at the trial (or in the main brief before the court of appeals) for failure to submit the issue of imputation to the jury.

The court of appeals ruled that imputation was a question of fact and not determinable as a matter of law, either in favor of or against Mr. Stricklin.[2] The trial court was, therefore, deemed correct in refusing petitioner's only requested instruction on that issue, but incorrect in not submitting the issue, as it did all the others, to the jury. In view of petitioner's conduct at trial, however, the lower court held that this omission was waived by petitioner.

ARGUMENT

The grounds asserted by petitioner in order to justify the granting of certiorari are wholly manufactured. We do not believe that they warrant detailed answers, nor, indeed, do certain assertions require any answer. We will be content to advance a few observations in order to focus the real nature of this case.

The gist of the lower court's opinion is waiver, pure and simple—a matter which fundamentally touches on policy questions, the solution of which calls for the exercise of a sound discretion in light of the precise

[2] Although not raisable in this opposition to the petition, we wish to make it clear, as stated in our brief below, that in our view the trial court in no way committed error but acted in precise compliance with Maryland law by instructing as it did against imputation.

circumstances involved. The court of appeals in this case simply refused to undo petitioner's wholly voluntary conduct—as exemplified before it and the trial court—in doggedly avoiding jury submission of the imputation issue.[3] The precedent cited for that determination was this Court's opinion in *Louisville & Nashville R. Co.* v. *Parker*, 242 U. S. 13 (1916), precisely like the case at bar.

There, Mr. Justice Holmes agreed with appellant railroad that the trial court erred in holding as a matter of law that appellee was *not* injured in interstate commerce. But at trial appellant in that case urged only that the jury be instructed that interstate commerce *was* involved. This Court held that since "the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand." *Id.*, at 15.[4]

Petitioner misconceives the opinion below because it mistakes the *Louisville* case. Mr. Justice Holmes in that case did not make any finding on the issue of whether the injury occurred in interstate commerce; he merely held that the appellant had waived, through its own conduct, the necessity for such a finding. That

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[3] In its petition for rehearing in the court below (R. 325), petitioner candidly admitted that it "certainly had no interest in seeing this case or any part of it submitted to a jury. . . ."

[4] Petitioner's asserted distinctions of the *Louisville* case are erroneous. The burden of proof as to the disputed question of interstate commerce was, on the facts there involved, upon the plaintiff, not the railroad. *Philadelphia & Reading R. Co.* v. *Polk*, 256 U. S. 332 (1921). Therefore, the asserted distinction becomes an *a fortiori* basis for application of *Louisville* here, since the burden of proof as to imputation, like any other defense, rested on petitioner—defendant below—not respondents.

is precisely what the court of appeals held in the instant case in respect to the issue of imputation. The distinction between waiver and determination of an ordinary fact question is too elementary to permit their confusion. The doctrine of waiver is particularly applicable in the instant case in view of petitioner's failure to file a motion for new trial or even complain of the trial court's conduct in this respect in its main brief before the court of appeals. While there may well be other cases involving other circumstances similar but not identical to the instant one in which such a waiver may not be spelled out,[5] it is submitted that the discretion exercised by the lower court herein was a sound one which poses no problem justifying certiorari herein.

Petitioner's hue and cry that it was "penalized" by the court of appeals also misconceives the nature of appellate review. The lower court pointed out that petitioner induced the trial court to erroneously exclude certain evidence offered by respondents to show that Mr. Stricklin relinquished whatever right of control he had over the management of the car (R. 128-130). In so stating, the lower court was not making "substituted" findings. It was only adverting to an additional circumstance which illustrated petitioner's consistent and erroneous position at trial that Mr. Stricklin was vicariously negligent as a matter of law

[5] Such a case was *St. Paul F. & M. Ins. Co.* v. *Bachman*, 285 U. S. 112 (1932) where *Louisville* was not relied on or discussed. In *St. Paul*, the failure of appellant to request jury submission of an issue involved in its second defense appeared to be wholly inadvertent since the very same issue was duly requested by appellant and submitted to the jury in connection with its first defense. *Id.*, 285. Supreme Court Records and Briefs, Transcript of Record, Defendant's Instruction No. 5, at page 150.

simply because he was the sole titled owner of and passenger in the automobile.

In view of petitioner's shift of position on appeal that title of and presence in the car, while not conclusive, gave rise to a presumption of agency which respondents did not rebut, the lower court might well have mentioned that petitioner could not claim an advantage as a result of its having induced error below. *New York Elev. R. Co.* v. *Fifth Nat. Bank*, 135 U. S. 432 (1890); *Rosaly* v. *Gonzalez*, 106 F. 2d 169 (1st Cir. 1939); *Missouri, K. & T. R. Co.* v. *Elliot*, 102 Fed. 96, 103-104 (8th Cir. 1900); *Boatmen's Bank of St. Louis* v. *Fritzlen*, 221 Fed. 145 (8th Cir. 1915); *Bursey* v. *Lyon*, 32 App. D. C. 231, 236 (1908). In other words, petitioner cannot claim, as it did in the court of appeals, that a presumption existed which was unrebutted when, in fact, such rebuttal evidence was erroneously excluded at its very own insistence. Petitioner in effect now claims that, because the lower court prevented it from gaining by the error which it induced, a penalty by way of "substituted" finding was inflicted. This is nonsense.

What this case is really about, but is being concealed by way of wholly fanciful and exaggerated "issues", is whether the court of appeals was correct in holding that the issue of imputation should have been submitted to the jury. While we believe the record and Maryland authorities support the trial court's disposition in instructing against imputation, at the very least they amply justify the conclusion of the court of appeals that the question herein was one of fact. If the issue was one of fact, then this case is in all respects like *Louisville*. That is the nub of

this case. There is no other issue involved, and petitioner's failure to so frame the issue reflects its understanding that there is no question involved which merits review by way of certiorari.

CONCLUSION

The decision below is correct and in accord with the decisions of this Court. The case does not present any conflict of decisions or question of importance. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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